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Esa Jurutera Perunding Sdn Bhd v Universiti Malaya

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)(C)-105–03 OF 2023
LEE SWEE SENG, CHE MOHD RUZIMA AND AZHAHARI RAMLI JJCA
28 JANUARY 2025

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Arbitration — Stay of proceedings — Steps taken in proceedings — Whether defendant's request for extensions to file defence and notice to produce documents amounted to 'taking any other steps in the proceedings' under s 10(1) of Arbitration Act 2005 — Whether High Court judge failed to consider letter stating reservation of rights — Whether words 'all of our client's rights' should be read to include defendant's right to invoke arbitration's clause — Whether defendant intended to abandon its right to arbitrate — Whether appellate intervention warranted

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This was an appeal by the defendant against the decision of the High Court judge ('HCJ') in dismissing its application for stay of proceeding in the High Court and for the case be referred to arbitration pursuant to s 10(1) of the Arbitration Act 2005 ('the Act') and/or O 69 r 10 of the Rules of Court 2012 ('the ROC'). Pursuant to a memorandum of agreement ('the MoA'), the defendant was appointed by the plaintiff as a civil and structural engineering consultant for a project. Clause 2 of the said MoA provided that the agreement between the parties consisted of the said MoA, the conditions of engagement and the schedule to the condition of engagement ('the said agreement'). However, due to the alleged failure, refusal and/or neglect on the part of the defendant to fulfil its obligation under the said agreement, the plaintiff had filed a Writ and Statement of claim against the defendant in the High Court. This was done despite the arbitration clause found in cl 4 the conditions of engagement (which formed part of the said agreement). After the service of writ and the statement of claim on 6 October 2022, the defendant entered appearance on 17 October 2022. The defendant was directed by the court to file its defence by 3 November 2022. The defendant then applied and was granted two extensions of time to file its defence. The defendant then served on the plaintiff a notice to produce documents. Subsequently, the defendant served a notice of arbitration on the plaintiff and filed the stay application by way of a notice of application. The High Court had dismissed the defendant's stay application on the grounds that: (a) by requesting for an extension of time twice, the defendant had clearly indicated an intention to deliver such pleadings and to defend the action in the proceedings and therefore, abandoning the right to arbitration; (b) if the defendant did not intend to defend the action and desired to defend itself in the arbitration proceedings,

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the defendant ought to have immediately filed a stay application under s 10(1) of the Act; and (c) the defendant had taken another step in the proceedings by serving the notice to produce documents pursuant to O24 r 10 of the ROC on the plaintiff's solicitor without making any express or unequivocal reservation of its rights to refer the matter to arbitration. The issue that arose for determination was whether by seeking an extension of time from the plaintiff to file the statement of defence and by filing notice to produce documents constituted 'a step in the proceedings' pursuant to s 10 of the Act.

Held, allowing the appeal:

(1) In answering the question whether the defendant had taken other steps in the proceedings, the defendant's solicitor's covering letter dated 7 March 2022 when serving the notice to produce documents must be considered. In the said letter, the defendant had reserved all its rights by stating 'In the meantime, all of our Client's rights are reserved'. Even though it was put in a general term, the defendant had expressed its intention of preserving its right to refer the dispute to arbitration. The words 'all of our client's rights' should be read to include the defendant's right to invoke the arbitration's clause. Unfortunately, this letter was not referred to by the HCJ in her judgment. Be that as it may, the application for extension of time and the filing of the notice to produce were not evidence of the defendant's unequivocal intention to proceed with the writ action. The extension of time sought did not prove that the defendant would eventually file its defence (see paras 30–31).

(2) Considering the fact that the contract between the parties were entered into in year 2008, it was not unreasonable to infer that the defendant, vide its notice to produce and the application for the extension of time, was ascertaining the nature of the agreement between the parties, including the arbitration clause. Therefore, there was no clear intention reflected in the action of the defendant in not wanting to proceed to arbitration but instead to litigation (para 32).

(3) The defendant had not irreversibly evinced its intention not to be bound by the arbitration agreement. The fact, taken holistically, did not show, that the defendant was submitting to the court's jurisdiction. Section 10 of the Act should be constructed so that there would be minimum intervention of the court pertaining to the parties' agreement to the arbitration clause. The court should, as far as possible lean in favour of the arbitration agreement that the parties had, at the outset of the contract, agreed to. The HCJ committed an appealable error when she failed to fully consider the facts of the case especially the effect of the defendant's reservation of its rights in its letter dated 7 March 2022. This error warranted appellate intervention (see paras 37–38).

[Bahasa Malaysia summary

Ini adalah rayuan oleh defendan terhadap keputusan Hakim Mahkamah Tinggi ('HMT') yang menolak permohonannya untuk menangguhkan prosiding di Mahkamah Tinggi dan untuk kes itu dirujuk kepada timbang tara menurut s 10(1) Akta Timbang Tara 2005 ('Akta tersebut') dan/atau A 69 k 10 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Menurut memorandum perjanjian ('MOA'), defendan telah dilantik oleh plaintif sebagai jurutera perunding kejuruteraan awam dan bangunan untuk sesuatu projek. Fasal 2 MOA tersebut memperuntukkan bahawa perjanjian antara pihak-pihak terdiri daripada MOA tersebut iaitu syarat-syarat keterlibatan dan jadual syarat keterlibatan ('perjanjian tersebut'). Walau bagaimanapun, disebabkan terdapat kegagalan, keengganan dan/atau pengabaian di pihak defendan untuk memenuhi kewajipannya di bawah perjanjian tersebut, plaintif telah memfailkan writ dan pernyataan tuntutan terhadap defendan di Mahkamah Tinggi. Tindakan ini dilakukan walaupun terdapat klausa timbang tara dalam kl 4 syarat keterlibatan (yang merupakan sebahagian daripada perjanjian tersebut). Selepas penyerahan writ dan pernyataan tuntutan pada 6 Oktober 2022, defendan memasukkan kehadiran pada 17 Oktober 2022. Defendan telah diarahkan oleh mahkamah untuk memfailkan pembelaannya sebelum 3 November 2022. Defendan kemudian memohon dan diberikan dua kali lanjutan masa untuk memfailkan pembelaannya. Defendan kemudian menyerahkan kepada plaintif Notis untuk Mengemukakan Dokumen. Selepas itu, defendan menyampaikan notis timbang tara ke atas plaintif dan memfailkan permohonan penangguhan melalui notis permohonan. Mahkamah Tinggi telah menolak permohonan penangguhan defendan atas alasan bahawa: (a) dengan memohon lanjutan masa sebanyak dua kali, defendan dengan jelas menunjukkan niat untuk menyerahkan pembelaan dan membela diri dalam tindakan dalam prosiding dan oleh itu, meninggalkan hak untuk timbang tara; (b) sekiranya defendan tidak berniat untuk mempertahankan tindakan itu dan ingin mempertahankan dirinya dalam prosiding timbang tara, defendan sepatutnya dengan segera memfailkan permohonan penangguhan di bawah s 10(1) Akta tersebut; dan (c) defendan telah mengambil langkah lain dalam prosiding dengan menyampaikan notis untuk mengemukakan dokumen menurut A 24 k 10 KKM ke atas peguam plaintif tanpa menyatakan pengekalan haknya dengan untuk merujuk perkara tersebut kepada timbang tara. Isu yang timbul untuk penentuan adalah sama ada dengan memohon lanjutan masa dari plaintif untuk memfailkan pernyataan pembelaan dan dengan memfailkan notis untuk mengemukakan dokumen merupakan 'satu langkah dalam prosiding' menurut s 10 Akta tersebut.

Diputuskan, membenarkan rayuan:

(1) Dalam menjawab soalan sama ada defendan telah mengambil langkah lain dalam prosiding tersebut, surat peguam defendan bertarikh 7 Mac

2022 semasa menyampaikan notis untuk mengemukakan dokumen haruslah dipertimbangkan. Dalam surat tersebut, defendan telah menyatakan untuk mengekalkan semua haknya dengan menyatakan 'In the meantime, all of our Client's rights are reserved'. Walaupun ianya diletakkan secara umum, defendan telah menyatakan niatnya untuk mengekalkan haknya untuk merujuk pertikaian itu kepada timbang tara. Perkataan 'all of our client's rights' haruslah dibaca untuk mengekalkan hak defendan untuk menggunakan klausa timbang tara. Malangnya, surat ini tidak dirujuk oleh HMT dalam penghakimannya. Walau bagaimanapun, permohonan untuk lanjutan masa dan pemfailan notis untuk mengemukakan dokumen tidak menunjukkan bahawa defendan mahu meneruskan tindakan writ. Lanjutan masa yang dipohon tidak membuktikan bahawa defendan kemudiannya akan memfailkan pembelaannya (lihat perenggan 30–31).

(2) Memandangkan terdapat perjanjian antara pihak-pihak yang dimeterai pada tahun 2008, adalah tidak munasabah untuk membuat kesimpulan bahawa defendan, melalui notisnya untuk mengemukakan dokumen dan permohonan lanjutan masa menunjukkan sifat perjanjian antara pihak-pihak, termasuk klausa timbang tara. Oleh itu, tiada niat yang jelas yang dalam tindakan sama ada defendan tidak mahu meneruskan ke timbang tara dan meneruskan tindakan litigasi (perenggan 32).

(3) Defendan tidak boleh mengelak untuk terikat dengan perjanjian timbang tara. Fakta yang diambil secara keseluruhan tidak menunjukkan bahawa defendan merujuk perkara tersebut kepada mahkamah. Seksyen 10 Akta tersebut haruslah ditafsirkan bahawa mahkamah harus campur tangan secara minimum apabila terdapat persetujuan pihak-pihak untuk bergantung kepada klausa timbang tara. Mahkamah juga harus bergantung kepada perjanjian timbang tara yang mana pihak-pihak bersetuju pada permulaan perjanjian dimeterai. HMT melakukan kekhilafan yang boleh dirayu apabila beliau gagal mempertimbangkan sepenuhnya fakta kes terutamanya kesan defendan terhadap pengekalan haknya dalam suratnya bertarikh 7 Mac 2022. Kekhilafan ini memerlukan campur tangan rayuan (lihat perenggan 37–38).]

Cases referred to

Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd [2024] 2 MLJ 471; [2024] 4 CLJ 243, CA (refd)

Austin and Whiteley Ltd v Bowley & Sons (1913) 108 LT 921 (refd)

Carona Holdings Pte Ltd and Others v Go Go Delicacy Pte Ltd [2008] 4 SLR 460, CA (folld)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)

Sanwell Corporation v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ

625; [2002] 3 CLJ 213, FC (distd)
Yeo Eng Lam v Infinity Vantage Sdn Bhd (Civil Suit No 02 (i)-20–03 of 2019 (N)), FC (refd)

Legislation referred to

Arbitration Act 2005 s 10, 10(1)
Rules of Court 2012 O 24 r 10, O 69 r 10

Appeal from: *Universiti Malaya v Esa Jurutera Perunding Sdn Bhd* [2023] MLJU 1130 (High Court, Kuala Lumpur)

Anantha Krishnan (with Ragumaren Gopal, Darryl Ragumaren and Farhanah Jahn) (G Ragumaren & Co) for the appellant.
Cheah Ka Mun (Tan Yon Chin (Pupil in Chambers)) (Wong Kian Kheong) for the respondent.

Azhahari Ramli JCA:

INTRODUCTION

[1] This is an appeal by the defendant in the court below against the decision of the learned High Court judge ('HCJ') dated 21 February 2023 in dismissing its application for stay of proceeding in the High Court, Kuala Lumpur and the case be referred to arbitration pursuant to s 10(1) of the Arbitration Act 2005 (the Act) and/or O 69 r 10 of the Rules of Court 2012 ('the ROC 2012'). In this judgment, the parties will be referred to as they were in the court below.

BACKGROUND FACTS

[2] Pursuant to a memorandum of agreement dated 3 June 2008 ('the said MoA'), the defendant was appointed by the plaintiff as a civil and structural engineering consultant for a project known as 'CADANGAN PEMBINAAN BANGUNAN TAMBAHAN DEWAN PEPERIKSAAN/DEWAN KULIAH, UNIVERSITI MALAYA'.

[3] Clause 2 of the said MoA provides that the agreement between the parties consists of the said MoA, the conditions of engagement and the schedule to the condition of engagement ('the said agreement').

[4] However, due to the alleged failure, refusal and/or neglect on the part of the defendant to fulfil its obligation under the said agreement, the plaintiff had, on 6 October 2022 filed a writ and statement of claim against the defendant in the Kuala Lumpur High Court. The defendant was served with the writ and statement of claim on 6 October 2022. This is done despite the arbitration

clause found in cl 4 the conditions of engagement (which forms part of the said agreement).

[5] The subsequent events that took place after the filing of the writ and the statement of claim form the basis of the contention, for and against, the defendant's application for stay. Those events will be elaborated in the following paragraphs.

[6] After the service of writ and the statement of claim on 6 October 2022, the defendant entered appearance on 17 October 2022. The defendant was directed by the court to file its defence by 3 November 2022.

[7] Vide letter dated 17 October 2022, the defendant applied, and the plaintiff granted an extension of time to file the defence by 17 November 2022.

[8] On 14 November 2022, the defendant applied for a second extension of time until 1 December 2022. The plaintiff agreed to that request.

[9] On 30 November 2022, the defendant served on the plaintiff a notice to produce documents referred to in pleadings dated 24 November 2022. In its email, the defendant informed the plaintiff that they require more time to finalise and file their defence and would be filing their defence by 5 December 2022.

[10] In response, the plaintiff's solicitors served a copy of the notice where documents may be inspected dated 30 November 2022 and provided all documents requested by the defendant by way of a notice to produce documents.

[11] On 2 December 2022, the defendant filed the stay application by way of a notice of application. It must be noted that on 1 December 2022 the defendant served a notice of arbitration on the plaintiff and its solicitor. On 14 December 2022, the High Court directed that the defendant does not need to file the defence until the disposal of the stay application.

[12] After hearing the parties, the learned HCJ dismissed the defendant's stay application on 21 March 2023. It must be noted that after the dismissal of the defendant's stay application, the defendant filed an application for an interim stay of the High Court decision on 21 March 2023. This application was dismissed by the learned HCJ and the defendant was ordered to file its defence by 7 March 2023. On 2 March 2023, the defendant filed a notice of appeal against the decision of the High Court to the Court of Appeal and filed another application for stay of all proceedings in the High Court pending the

disposal of the appeal. On 6 March 2023, the defendant filed another application for an ad interim stay order (the second stay application) pending the disposal of that second stay application. As per the earlier direction of the learned HCJ, the defendant filed its defence and counterclaim on 7 March 2023. On 18 April 2023, the learned HCJ dismissed the second stay application.

DECISION OF THE LEARNED HCJ

[13] The learned HCJ applied the principle in *Sanwell Corp v Trans Resources Corp Sdn Bhd* [2002] 2 AMR 2257 and opined that the entry of an appearance by the defendant does not amount to a step in the proceeding within the meaning of s 10(1) of the Act. The issue before her was whether the other actions by the defendant amount to taking a step in the proceedings such that the defendant can be said to have abandoned its right to have the dispute disposed by way of arbitration.

[14] The learned HCJ opined that irrespective of the justification for the defendant's request for extension of time, the defendant has unequivocally evinced an intention to submit to the jurisdiction of the court by wanting to file the defence within the extended time as allowed. Hence, in Her Ladyship view, by requesting for an extension of time twice, the defendant has clearly indicated an intention to deliver such pleadings and to defend the action in the proceedings and therefore, abandoning the right to arbitration. The learned HCJ further opined that if the defendant did not intend to defend the action and desired to defend itself in the arbitration proceedings, the defendant ought to have immediately filed a stay application under s 10(1) of the Act. Further, the learned HCJ also was of the view that the defendant had taken another step in the proceedings by serving the notice to produce documents pursuant to O 24 r 10 of the ROC 2012 on the plaintiff's solicitor without making any express or unequivocal reservation of its rights to refer the matter to arbitration. Hence, the learned HCJ ruled that the defendant has submitted to the jurisdiction of the court and has abandoned its right to rely on cl 4 of the conditions of engagement to refer the dispute to arbitration.

ANALYSIS AND OUR DECISION

[15] We have perused the appeal record and submission by the parties before us. In our view, the determinative issue in this appeal is on the interpretation of the phrase 'before taking any other steps in the proceedings' as stipulated under s 10(1) of the Act. The plaintiff takes the position that the defendant had taken steps in the proceeding and indicated their intention to proceed with the court proceedings when they:

(a) requested for at least two extensions of time from the plaintiff to file their defence;

(b) indicated three times that they will file their defence; and

(c) served the notice to produce documents pursuant to O24 r 10 of the ROC 2012 without making express or unequivocal reservation of their rights to refer the matter to arbitration.

[16] Quite naturally, the defendant submitted that there is no clear intention on its part to waive its right to arbitration. Citing the case of *Yeo Eng Lam v Infinity Vantage Sdn Bhd* (Civil Suit No 02 (i)-20–03 of 2019 (N)) it was impressed upon us that every case must be considered holistically with a view to ascertaining whether the party seeking a stay has in fact unequivocally waived its right to have the matter determined by way of arbitration as originally agreed between the parties. In that case, the Federal Court opined that the application to disqualify a solicitor of the respondent therein from continuing to act on its behalf without any reservation of rights was necessary but peripheral which did not touch on the merits of the substantive dispute. The defendant takes the view that by applying for the extension of time and at the same time refraining from filing the statement of defence they were not submitting to the jurisdiction of the court. Likewise, the filing of the notice to produce documents does not amount to unequivocal waiver by the defendant from referring the dispute to the arbitration. In the affidavit affirmed on 31 May 2024, the defendant averred that upon been served with the statement of claim, the defendant needed time to check with the facts and issues pleaded by the plaintiff as the matter relates to the documents for the said projects since year 2008.

[17] Section 10(1) of the Act provides:

> A court before which proceedings are brought in respect of a matter which is the subject matter of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds the agreement is null and void, inoperative or incapable of being performed.

[18] This provision makes it mandatory for the court, upon application by a party, to stay and refer any dispute which is subject to an arbitration agreement to arbitration provided that the application is made before the party takes any other steps in the proceedings and that the agreement is not null and void, inoperative or incapable of being performed. This principle of law is explained in the case of *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1 where the Federal Court held:

> [32] The clear effect of the present s 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled;

while under s 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.

[33] What the court needs to consider in determining whether to grant a stay order under the present s 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference (see *TNB Fuel Services Sdn Bhd*). In fact, the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s 10(1). It is an issue to be decided by the arbitral tribunal.

[19] Section 10(1) of the Act is consistent with the principle of sanctity of contract; that the parties will be bound by the terms of the contract that have been agreed upon. Hence, if a party to an arbitration agreement chose to file its claim in court, it will be in breach of that agreement. This proposition of law is pronounced in the case of *Airbus Helicopters Malaysia Sdn Bhd (formerly known as Eurocopter Malaysia Sdn Bhd) v Aerial Power Lines Sdn Bhd* [2024] 2 MLJ 471; [2024] 4 CLJ 243 that:

[15] The basic principle must be stated at the outset: an arbitration agreement is a term of the underlying contract and the court would enforce it unless it can be shown that the agreement is null and void, inoperative or incapable of being performed. The Federal Court in *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1 had stated the position of the law emphatically as follows:

> [88] The court should lean more towards granting a stay pending arbitration under s 10(1) of the 2005 Act, even in cases where the court is in some doubts about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the ambit of the arbitration clause.

[16] If there is a prima facie arbitration agreement the party commencing litigation would be in breach of such an agreement and when objected to by the defendant promptly, the court would generally grant a stay of the court's proceedings unless the defendant had evinced a clear and unequivocal intention to proceed with the suit and not to be bound by the arbitration agreement. The court in line with holding the parties to their bargain instead of allowing a party to breach it, would enforce the arbitration agreement by granting a stay of the court proceedings. Thus, in *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] MLJU 1873; [2015] CJLU 1435; [2015] 1 LNS 1435, Mary Lim J (now FCJ) explains as follows:

> [36] The whole jurisprudence that has developed around the court's minimum intervention in arbitration is because of the recognition of the parties' freedom to contract, including the freedom to contract on how and where they would like to resolve any dispute or difference that may arise between them. Where the parties have made that choice in clear and emphatic terms, the court tend to lean in favour of upholding such a clause which is after all, a contractual term. I have

myself observed in for example *Government of India v Cairns Energy & others* [2013] MLJ 123, just as many other courts have, that where the courts sent the parties back to their contractual terms, this is done not because lack jurisdiction. On the contrary, the courts do have jurisdiction. In and when referring the parties to arbitration, all the court are doing is reminding the parties of their contractual obligation and ensuring that the parties keep to their end of bargain. It is not for want of jurisdiction.

...

[18] Another way of looking at the situation is from the point of view of whether the defendant has waived its right to insist on going for arbitration or is otherwise estopped from so contending by its action or inaction in court.

[19] Very often during case management, if not earlier, the solicitors acting for the defendant would request from the court an extension of time to file defence or that they may have written to the plaintiff's solicitors for such an extension and may have obtained the latter's consent to the extension ...

[20] Consistent with the principle that the courts will lean in favour of arbitration if the parties have a clear arbitration clause in their underlying contract, there must then be an equally clear intention reflected in the action of the defendant in not wanting to proceed to arbitration but instead to litigation. After all an arbitration agreement is a term of contract and one would have thought that the plaintiff would have known of the arbitration agreement too as it would in all likelihood have scrutinized the relevant clauses in the underlying contract before filing its claim in court. It goes without saying that the plaintiff did not at the outset write to the defendant to say that whilst parties had an agreement to arbitrate, it now wanted to litigate and then to seek the defendant's written agreement to vary the mode of dispute resolution to that of litigation instead of arbitration.

[20] As stated earlier, the arbitration clause in this appeal is found in cl 4 of the conditions of engagement, which provides:

4. SETTLEMENT OF DISPUTES

(1) If at any time any question, dispute, or difference of opinion shall arise between the CLIENT and the Consulting Engineer upon or in relation to or in connection with this agreement or any part thereof either party may forthwith give to the other notice in writing of the existence of such question, dispute or difference of opinion and the same shall be referred to the arbitration of a person to be mutually agreed upon or failing agreement within (2) months from the date of the notice then to such person appointed by the President of the Board of Engineers, Malaysia and such reference shall be deemed to be a submission under the Arbitration Act 1952 and any statutory modification or re-enactment thereof for the time being and the award of the Arbitrator shall be final and binding upon the parties. Pending the award of the arbitration, the Consulting Engineer, upon being directed by the CLIENT at any time, shall continue to perform the remaining part of the services in accordance with the programme as set out in the works schedules and no payment the liability for which is not in issue or contingent upon the results of the proceedings shall be withheld on account of such proceedings.

[21] Based on the clear and unambiguous words in cl 4 of the conditions of engagement, there is no doubt that the plaintiff and defendant had agreed to refer any dispute arising from the agreement to arbitration. While the parties should honour this agreement, s 10(1) of the Act allows the plaintiff to commence a writ action in the court, provided that it can show that the defendant had taken any other steps in the proceedings.

[22] In the case of *Sanwell Corporation v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625; [2002] 3 CLJ 213, the Federal Court opines:

> ... If the applicant has taken his first step in the proceedings by entering an appearance, that step is a permissible step that is not considered to be a step in the proceedings that would bar an application for stay. However, if the applicant has subsequently delivered any pleadings, or taken any other steps in the proceedings which indicates his election to allow the action to proceed in the court, the applicant will be considered to have abandoned his right to seek recourse to arbitration and would be barred from applying for a stay of the proceedings.
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> ... Therefore, the legal position in Malaysia may be neatly summarised as follows:
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> (a) the entry of appearance is a mandatory procedural step to be taken by an applicant in a proceeding as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of s 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;
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> (b) if the applicants have served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration; and
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> (c) if he has taken any other action in the proceedings (other than step (a) and (b) abovementioned), the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

[23] It must be noted that *Sanwell* was decided prior to the enforcement of the Rules of Courts 2012 where the defendant may file a conditional or unconditional appearance after being served with the writ and statement of claim. However, that case did not distinguish the two types of appearance hence it is still a relevant authority under the ROC 2012.

[24] Secondly, it is also to be noted that, at the High Court, the defendant in

this appeal had filed its defence upon the direction of the court after its application for stay in the High Court was dismissed. It can be safely said that, besides filing the notice to produce documents referred to in the pleadings, the defendant had not filed any pleadings for the purpose of trial of the case.

[25] Hence, we agree with learned counsel for the defendant that limbs (a) and (b) in *Sanwell* case are not applicable in the present case. Hence, what need to be determined here is whether the facts of the case fall within limb (c) of the case, namely whether the actions taken by the defendant had shown its intention of not to be bound by the arbitration agreement, but instead to proceed with the writ action. This is a question of fact that need to be decided based on the facts and circumstances of the case.

[26] There are two main actions taken by the defendant after the service of the writ. The first was the defendant's applications for extension of time to file the defence and secondly the defendant's notice to produce documents referred to in the pleadings. The plaintiff submits that these two actions clearly reflect the unqualified intention of the defendant to proceed under the writ action and to abandon their right to refer the dispute to arbitration.

[27] The issue now is whether by seeking an extension of time from the plaintiff to file the statement of defence and by filing notice to produce documents referred to in the pleadings constitute 'a step in the proceedings'.

[28] In this regard, the Singapore's Court of Appeal case of *Carona Holdings Pte Ltd and Others v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 is a persuasive authority on this issue. It was held in paras [93] and [94] as follows:

> Synopsis
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> [93] Having examined the approaches adopted in various other jurisdictions, such as Hong Kong, Malaysia and Canada, it appears to us that the courts in these jurisdictions appears to quite uniformly take into consideration the circumstances enveloping an act in deciding if it constitutes a step in the proceedings. First, where a party performs or carries out a significant act signifying that it is submitting to the court's jurisdiction rather than to arbitration to resolve the outstanding issues between the parties, that party will be deemed to have taken steps in the proceedings. Second, the act will be regarded as a step in the proceedings if it is a step in furtherance of the action by advancing the hearing of the matter in court in contrast to one that serves to smother the action and stop the proceedings dead in its tracks. Third, where a party does an act with the consent of the other party, this will not amount to taking a step in the proceedings. Finally, the court usually take the position that the party should not blow hot and cold or equivocate. Instead, they should be decisive about whether they are insisting on arbitration in preference to litigation ...
>
> The Singapore position

> [94] In our view, an application for an extension of time to file a defence plainly does not constitute 'a step in the proceedings' under s 6(1). First, as mentioned earlier, we agree with the views of Woo JC expressed in *Yeoh Poh San* ([21] supra) that, where a plaintiff's solicitor insists on the filing of the defence notwithstanding the pending application or an appeal therefrom, the defendant's solicitor should then promptly apply for an extension of time to file the defence pending the outcome of the appeal. A pragmatic approach is warranted when assessing the procedural act in question. We are not impressed by some of the older English cases that appear to place an undue premium on procedural subtleties rather than on the substance of the matter at hand. In our view, it would be a mistake to place too much emphasis on the means adopted rather than on the ends of an application to stay which is to challenge the appropriateness of the court's jurisdiction and to bring an immediate closure to the pending court proceedings ....

[29] Guided by the decision in *Carona*'s case, the pertinent question to ask is whether the request for the extension of time and the filing of the notice to produce are 'steps in furtherance of the action by advancing the hearing of the matter in court in contrast to one that serves to smother the action and stop the proceedings dead in its tracks'. Put in another perspective, the action taken by the defendant must show its intention that he desires that the writ action should proceed and has no desire that the matter should be referred to arbitration (see *Austin and Whiteley Ltd v Bowley & Sons* (1913) 108 LT 921). The defendant's action must not be seen as its intention to take steps to answer the plaintiff's claim.

[30] In answering the question whether the defendant has taken other steps in the proceedings, two actions referred to in para [26] above, must be considered in the light of the defendant's solicitor's covering letter dated 7 March 2022 when serving the notice to produce documents referred to in the pleadings on the plaintiff. In the said letter, the defendant requested the plaintiff to furnish the documents referred to in the said notice for the defendant 'to prepare a Statement of Defence and for the pre-trial Case Management to run smoothly'. In the same letter, the defendant had reserved all its rights in the following manner:

> In the meantime, all of our Client's rights are reserved

[31] We take the view that by this paragraph, even though it was put in a general term, the defendant had expressed its intention of preserving its right to refer the dispute to arbitration. The words 'all of our client's rights' should be read to include the defendant's right to invoke the arbitration's clause. Unfortunately, this letter was not referred to by the learned HCJ in her judgment. Be that as it may, taking into consideration the background facts of this case as referred to in paras [5] to [11] above, it can be safely concluded that the application for extension of time (which was consented to by the plaintiff) and the filing of the notice to produce are not evidence of the defendant's

unequivocal intention to proceed with the writ action. The extension of time sought does not prove that the defendant will eventually file its defence.

[32] In this respect, in its letter to the Deputy Registrar of the High Court dated 31 October 2022, the defendant did confirm that during the case management conducted via e-review, the defendant had notified the High Court that they would be filing the defence on or before 3 November 2022. However, the extension of time sought is to 'prepare and finalise (menyediakan dan memuktamadkan)' the defence. It does not suggest that subsequent to the case management, the defendant would be filing its defence. Considering the fact that the contract between the parties were entered into in year 2008, it is not unreasonable to infer that the defendant, vide its notice to produce and the application for the extension of time, was ascertaining the nature of the agreement between the parties, including the arbitration clause. In addition, the general reservation of right as highlighted in the letter dated 24 November 2022 shows that at best, the defendant is preparing to take other steps in the proceeding including the filing of the application for stay. This is further fortified by the fact that the defendant had filed the notice of application for stay on 2 December 2022 barely two days from the date of service of the notice where documents may be inspected dated 30 November 2022 by the plaintiff's solicitors together with all documents requested by the defendant by way of a notice to produce documents. Further, a notice of arbitration was also served on the plaintiff on 1 December 2022. In our view, from the facts of this case, there is no clear intention reflected in the action of the defendant in not wanting to proceed to arbitration but instead to litigation.

[33] In addition, it is also pertinent to note that the statement of defence was filed by the defendant after being directed by the court at the case management stage. This was done after the application for interim stay of the High Court order was dismissed. However, in its covering letter when filing the defence, the defendant had expressly reserved its right to refer the dispute to arbitration. The relevant part of the said letter which was dated 7 March 2023 reads:

> Sepertimana arahan Mahkamah ini dan tanpa prejudis kepada hak Defendan untuk merujuk pertikaian antara Plaintif dan Defendan di sini kepada prosiding timbang tara, dilampirkan di sini sesalinan Pembelaan dan Tuntutan Balas Defendan bertarikh 7.3.2023 untuk tujuan penfailan

[34] Likewise, the defendant had also reserved its right in the statement of defence and counterclaim. It was pleaded that:

> 1. Pada awalnya, Defendan menyatakan bahawa Pembelaan dan Tuntutan Balas ini (P&TB) difailkan tanpa menjejaskan hak Defendan untuk merujuk pertikaian pihak-pihak di sini kepada prosiding timbang tara (sepertimana dipersetujui secara kontrak antara pihak-pihak — klausa 4, Memorndum Perjanjian) ...

2. Defendan berhasrat untuk merujuk pertikaian pihak-pihak di sini kepada prosiding timbang tara dan tidak meneruskan (not to proceed) dengan tindakan Mahkamah di sini ...

[35] In this regard the case of *Airbus Helicopters Malaysia Sdn Bhd*, this court had stated:

> [49] A workable guide to determining if a step is 'before taking any other steps in the proceedings' is perhaps to ask if the step is *merely preparatory to 'taking any other steps' or is it 'the steps itself'* and a request for extension of time to file defence which defence was never filed and which stay application was filed even before the time-frame as stipulated in the ROC 2012 for the defence to be filed before the extension of time operates, may well be within the meaning of 'before taking any other steps in the proceedings'. (Emphasis added.)

[36] The guideline as suggested in *Airbus Helicopters Malaysia Sdn Bhd* is an objective approach in balancing the right of the plaintiff to litigate its claim in court and the defendant's right under s 10 of the Act. This is especially so when the phase 'taking any other steps in the proceedings' would invariably requires the court to evaluate the contradictory evidence and submission adduced by the parties.

[37] Hence, from the facts, we are of the view that the defendant has not irreversibly evinced its intention not to be bound by the arbitration agreement. The fact, taken holistically, did not show, that the defendant is submitting to the court's jurisdiction. It is also appropriate to remind ourselves that s 10 of the Act should be constructed so that there would be minimum intervention of the court pertaining to the parties' agreement to the arbitration clause. The court should, as far as possible lean in favour of the arbitration agreement that the parties had, at the outset of the contract, agreed to. This is so when one of the parties had chosen to breach the arbitration agreement. Even if the intention may not be so clear but still falling short of taking the plunge in the proceedings as it were and still very much dealing with the preliminaries and things peripheral to the actual prosecution or defence of the proceedings, the court should give every encouragement to the parties to abide by the arbitration agreement entered into as the way of resolving the disputes.

[38] Based on the foregoing reasons, we find merits in this appeal. The learned HCJ committed an appealable error when she failed to fully consider the facts of the case especially the effect of the defendant's reservation of its rights in its letter dated 7 March 2022. This error warrants our appellate intervention. This appeal is hereby allowed. We set aside the order of the learned HCJ. We now grant an order in terms of the defendant's notice of application dated 2 December 2022. We order costs of RM10,000 here and below to the defendant subject to allocator fees.

A *Appeal allowed.*

Reported by K Selvaraju

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